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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Plaintiff and Appellant,

v.

G & K AUTOMOTIVE CONVERSION, INC.,

Defendant and Respondent.

G041130

(Super. Ct. No. 30-2008-00103378)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kirk H. Nakamura, Judge. Reversed.

Cholakian & Associates and Kevin K. Cholakian for Plaintiff and Appellant.

Marshall, French & DeGrave and Keith A. Haskins for Defendant and Respondent.

* * *

Defendant G & K Automotive Conversion, Inc., demurred to plaintiff's State Farm Mutual Automobile Insurance Company's first amended complaint on grounds each claim in the complaint was barred by the statute of limitations. The court sustained the demurrer without leave to amend, ruling the delayed discovery and fraudulent concealment rules did not toll the statute of limitations. By sustaining the demurrer without leave to amend, the court found as a matter of law that no reasonable person could conclude plaintiff diligently investigated its claim or reasonably relied on defendant's misrepresentations. We disagree and reverse.

FACTS

Accepting "as true all material allegations of the complaint" (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 929 (*Bernson*)), we draw the following facts from plaintiff's first amended complaint.

The case involves a 2002 Ferrari 360 (the subject Ferrari) that was leased by plaintiff's insured. The subject Ferrari "was a 'Grey Market' vehicle, manufactured to European safety and emissions standards, . . . imported into the United States from Europe through a source other than an authorized Ferrari dealer." "Under such circumstances, Federal law requires . . . the importer to alter the vehicle so that it complies with all U.S. safety and emissions standards."

"One important difference between U.S. certified Ferrari vehicles and non-U.S. certified vehicles is the fuel tank design." "In order to modify the fuel system of a non-U.S. certified Ferrari 360, so as to meet the NHTSA [National Highway Traffic Safety Administration] crash test requirements referred to as FMVSS 301, the registered importer was required to make a number of substantial modifications to the Ferrari fuel system."

In 2002, defendant petitioned the United States Department of Transportation "for an order allowing it to import and modify '2002 Ferrari passenger cars . . . that were not originally manufactured to comply with all applicable Federal motor vehicle safety standards.'" "NHTSA granted the Importation Petition," and required defendant "to make, among other changes, the following changes to the non-U.S. certified 2002 Ferrari 360s' fuel systems, in order that the vehicles would meet the FMVSS standard: [¶] (a) Replacement of [certain vehicle parts] on non-U.S. certified versions of the vehicle to make them identical to those in the U.S. certified version; [¶] (b) Modification of the U.S. model filler neck so that it can be attached to the non-U.S. model fuel tank; and [¶] (c) Relocation of [certain vehicle parts] so that they are in essentially the same position as those components found on a U.S. certified vehicle."

Defendant modified the subject Ferrari.

In January 2003, defendant issued to NHTSA two documents: a "Certification of Completion of the modifications to the subject Ferrari," and a "Statement of Conformity with NHTSA requirements for the subject Ferrari's modifications . . . ." Both documents were false. Defendant misrepresented to NHTSA that the modifications had been completed as required and that defendant had conformed to NHTSA requirements. NHTSA did not audit the modifications or defendant's statement. Therefore, NHTSA did not discover defendant's misrepresentations. "According to NHTSA records, therefore, the vehicle had been properly modified, and no investigation of these records could have revealed otherwise."

Although defendant "issued a Statement of Conformity with NHTSA requirements for the subject Ferrari's modifications, in reality, [defendant] had neither purchased nor installed the full range of vehicle parts necessary to comply with NHTSA requirements for the proper modification of the subject Ferrari. In reality, dozens of required vehicle parts had neither been acquired nor installed, including parts required for

proper and safe modification of the subject Ferrari's fuel system." The modifications made by defendant "rendered the subject Ferrari's fuel system defective and unsafe."

Defendant issued a warranty "for the emissions modifications" to the first owner of the subject Ferrari.

In November 2003, plaintiff's insured leased the subject Ferrari. In January 2004, plaintiff's insured drove the subject Ferrari, with his five-year-old son as a passenger, onto a freeway off-ramp as he exited the highway. The car's speed was around 45 miles per hour at the time. Plaintiff's insured "heard an explosion, and immediately afterwards flames billowed out of the left rear of the vehicle, coming through his open driver's side window and singeing his arm and face. He stopped the vehicle, quickly evacuated himself and his son from the car, and ran with his son to a safe distance, in case the car exploded. The subject Ferrari was completely destroyed by fire."

"Following the fire and destruction of the subject Ferrari, investigation of the cause of the fire was conducted by" plaintiff. Plaintiff "retained fire cause and origin motor vehicle expert William Hagerty . . . to examine the burned vehicle and give an opinion as to cause and origin. Mr. Hagerty examined the burned out vehicle . . . and determined in his report dated April 5, 2004, that while driving on the highway, the subject Ferrari had struck a road hazard, which caused a blowout of the rear left tire and rim, causing the rear left tire to shred. Mr. Hagerty found that the damaged pieces of the tire were projected through the fuel filler neck of the vehicle and tore the evaporative emissions hose loose from the top of the fuel tank. The fuel thereafter spilled and ignited on the catalytic converter, causing a catastrophic fire."

"Mr. Hagerty determined that the fuel filler neck of the vehicle had been exposed to foreseeable damage caused by a shredding rear left tire, that was positioned only a few inches away, because no effective impact protection existed between the fuel filler neck and the rear left wheel. Mr. Hagerty therefore opined that the design and layout of the fuel filler neck, evaporative emissions system hose and other related parts of

the fuel system, was defective and improper, rendering the fuel system unsafe in the face of a foreseeable rear tire blow-out. Mr. Hagerty recommended that Ferrari North America be requested to come and inspect the vehicle."

Plaintiff obtained documents from the insured concerning the car's "evaporative emissions modifications by" defendant. Plaintiff observed "the statement of compliance and statement of conformity submitted by [defendant] to NHTSA and the approval by NHTSA of the modifications allegedly made by [defendant], and the subsequent clearance for the vehicle to be operated on the highways of the USA." Plaintiff conducted an investigation into whether it "had any basis for a claim against [defendant] for faulty modification of the product. That investigation, relying on [defendant's] false statements filed with NHTSA, concluded that there was no basis for such a claim, because it . . . appeared to [plaintiff] from the documents it had access to, that NHTSA had approved [defendant's] modifications." Because the subject Ferrari "was burned out, which meant that the area where the fire had started was heavily burned and charred, [plaintiff's] expert could not . . . have precisely identified the components that had been used nor matched them to the NHTSA required specifications, as these components were burned, melted or charred." At this time, plaintiff "did not have access to Ferrari's evaporative emissions engineers. Indeed, since [plaintiff] was looking to Ferrari for recovery of insurance monies, Ferrari was an adverse party." Based on all of the above, plaintiff had no "way of knowing" defendant had improperly modified the subject Ferrari.

Plaintiff paid a total of $228,037.75 on the insured's claim.

In November 2004, plaintiff filed a lawsuit "against Ferrari North America, alleging product defect (negligent design and manufacture)" and subsequently amended the complaint to sue "Ferrari S.p.A., in Italy . . . , alleging product defect (negligent design and manufacture of fuel filler hose and fuel system)." In May 2005, discovery commenced.

"During the course of litigation against Ferrari S.p.A., in an effort to establish more details of what modifications [defendant] had made to the vehicle, [plaintiff] subpoenaed records from [defendant], which were received on or around April 3, 2006." "Nothing in the documents produced by [defendant] in response to subpoena suggested or indicated that [defendant] had failed to properly modify the subject Ferrari as required by NHTSA, nor that [defendant] had negligently and defectively modified the fuel system of the subject Ferrari with non-approved parts." Defendant "concealed all information about [the] defective modifications." Defendant's "documents misrepresented what had been done to the vehicle." As "of April 2006, while Ferrari had been invited to come and inspect the vehicle, Ferrari had chosen not to inspect the vehicle." Plaintiff had no way "to obtain input from Ferrari, since Ferrari was an adverse party."

Around May 2006, plaintiff retained an additional expert, Gregory Barnett, "an expert in vehicle engineering, design, tire failure and accident reconstruction. Mr. Barnett inspected the burned out car and reviewed all available documents, including [defendant's] subpoenaed documents, and produced a report for [plaintiff] on June 5, 2006. In that report Mr. Barnett stated that the design of the fuel system/fuel filler hose was defective, being situated very close to the rear wheel and at risk of foreseeable tire blow out. Mr. Barnett attributed that design defect to Ferrari." In response to plaintiff's specific inquiry, Barnett stated he had found no "basis for filing suit against" defendant.

At that time, "[o]nly a Ferrari engineer, with knowledge of Ferrari's design system and trade secrets, could have identified the modifications by [defendant] as improper, and therefore revealed [defendant's] compliance statements as false, and as yet Ferrari had not inspected the vehicle."

In January 2007, Ferrari, S.p.A. deposed defendant's "Person Most Knowledgeable, George Gemayel." "In Mr. Gemayel's deposition, he was vague in his responses, contending that he could not remember anything about the subject Ferrari, and

that he had no documents other than those that had already been produced," thus concealing all information about these defective modifications and misrepresentations. In his deposition, Gemayel stated that defendant's compliance forms showed "proof of compliance with the EPA standards" and Department of Transportation standards.

"Only after March 30, 2007 did [plaintiff] have discovery access to Ferrari's in-house compliance and emission design experts. On expert inspection of the remains of the subject Ferrari, in early summer of 2007, Ferrari's experts for the first time discovered that the fuel system and other parts of the subject Ferrari had been modified defectively. Ferrari's experts discovered that [defendant] had modified the fuel system and other parts of the subject Ferrari with literally dozens of nonapproved parts, in violation of NHTSA requirements, and that [defendant] had therefore filed inaccurate compliance statements to the NHTSA, misrepresenting to NHTSA that [defendant] had complied with modification requirements when in reality it had not."

"[D]espite its diligent investigations, [plaintiff] could not have . . . discovered [defendant's] role in defective modification until after March 30, 2007." Plaintiff "could not have brought suit against [defendant] at an earlier time than the present lawsuit, and no reasonable investigation could have revealed [defendant's] negligence, because [defendant] deliberately and fraudulently concealed its negligent and defective modifications of the subject Ferrari from the NHTSA, by filing false compliance statements and concealing what it had done and not done as to the modification of the subject Ferrari vehicle." Plaintiff "had no way to independently verify that [defendant] had not complied, since the interior of the Ferrari was burned, melted or charred."

Plaintiff dismissed its lawsuit against Ferrari for product defect.

Plaintiff sued defendant for general negligence, products liability and fraud.

DISCUSSION

Plaintiff contends the court erred by sustaining defendant's demurrer to the operative complaint on the basis the delayed discovery and fraudulent concealment rules did not toll the statute of limitations.

We review the complaint "de novo to determine whether it contains sufficient facts to state a cause of action. [Citation.] In doing so, we accept as true the properly pleaded material factual allegations of the complaint, together with facts that may be properly judicially noticed." (*Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497.) "Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We do not assume the truth of pleaded "'contentions, deductions or conclusions of fact or law.'" (*Ibid.*) "Because [defendant] was denied leave to amend we construe [the complaint's] allegations liberally 'with a view to substantial justice between the parties.'" (*CAMSI IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1530 (*CAMSI*).) The plaintiff "bears the burden of demonstrating that the trial court erroneously sustained the demurrer as a matter of law." (*Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.)

Here, plaintiff asserts its complaint "sufficiently pleaded facts with specificity that met the requirements of the delayed discovery rule and the [fraudulent] concealment rule, by explaining why reasonable investigation prior to the expiry of the statute of limitations did not and could not have revealed a factual basis for a lawsuit against [defendant]." Given that properly pleaded facts must be accepted as true at the demurrer stage, the court's sustention of the demurrer amounted to a ruling that the complaint's alleged facts were insufficient as a matter of law to toll the statute of limitations. "'[O]nce properly pleaded, belated discovery'" is normally a question of fact and becomes a matter of law only when "'reasonable minds can draw only one

conclusion from the evidence.'" (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1320 (*E-Fab*).) Plaintiff asserts reasonable minds could differ on whether the facts alleged in the complaint supported application of the delayed discovery or fraudulent concealment rules.

At the hearing on defendant's demurrer to the complaint, plaintiff's counsel stated: "[T]he question for the court is, . . . Would no reasonable person come to the conclusion that [plaintiff] was duly diligent? The court is taking the position that no reasonable person could possibly come to this decision on that basis." The court replied, "I'm not saying that." Plaintiff's counsel reiterated: "For the court to rule on this as a question of law, the court has to make the decision, Your Honor, that no reasonable person could differ with [plaintiff's] conduct and that it could only have been not diligent." The court replied: "Counsel, that is not what the law is and that is not what the court is holding, either. The court is holding that there's sufficient facts that . . . the plaintiff, was on notice of a potential claim, which is what the law is."

The court subsequently issued a written order sustaining the demurrer without leave to amend. The order stated: (1) The action was barred by the three year statute of limitations pursuant to Code of Civil Procedure section 338, subdivisions (c) and (d) (injury to personal property and fraud); (2) Under *Grisham v. Phillip Morris U.S.A, Inc.* (2007) 40 Cal.4th 623, 634 (*Grisham*), *Bernson, supra,* 7 Cal.4th at pp. 936-937, and *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 813 (*Fox*), the delayed discovery rule and the fraudulent concealment rule did not toll accrual of plaintiff's claim; and (3) The following facts pleaded by plaintiff supported the court's order: "(a) Within three months after the fire underlying plaintiff's claim, plaintiff knew that the fire was caused by damage to the fuel filler neck and evaporative emissions hose; [¶] (b) Within those same three months, plaintiff knew that the components were parts that had to be modified on a 'grey market' vehicle; [¶] (c) Within those same three months, plaintiff knew that defendant . . . performed the modification work; and, [¶] (d)

The claim involved in this matter (i.e.: product liability) is the same type of claim previously prosecuted against the manufacturer of the involved vehicle."

We review the law governing the delayed discovery and fraudulent concealment rules. "[U]nder the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis." (*Fox, supra,* 35 Cal.4th at p. 803.) "In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not withstand demurrer.'" (*Id*. at p. 808.)

"A close cousin of the discovery rule is the 'well accepted principle . . . of fraudulent concealment.' [Citation.] 'It has long been established that the defendant's fraud in concealing a cause of action against him tolls the applicable statute of limitations, but only for that period during which the claim is undiscovered by plaintiff or until such time as plaintiff, by the exercise of reasonable diligence, should have discovered it.' [Citation.] Like the discovery rule, the rule of fraudulent concealment is an equitable principle designed to effect substantial justice between the parties; its rationale 'is that the culpable defendant should be estopped from profiting by his own wrong to the extent that it hindered an "otherwise diligent" plaintiff in discovering his cause of action.'" (*Bernson, supra,* 7 Cal.4th at p. 931.)

As stated above, "[r]esolution of the statute of limitations issue is normally a question of fact." (*Fox, supra,* 35 Cal.4th at p. 810.) As early as 1917, our Supreme Court stated, "Whether a party has notice of 'circumstances sufficient to put a prudent man upon inquiry as to a particular fact,' and whether 'by prosecuting such inquiry, he might have learned such fact' [citation], are themselves questions of fact . . . ."

(*Northwestern Portland C. Co. v. Atlantic Portland C. Co.* (1917) 174 Cal. 308, 312.) Under the delayed discovery rule, "[t]here are no hard and fast rules for determining what facts or circumstances will compel inquiry by the injured party and render him chargeable with knowledge. [Citation.] It is a question for the trier of fact." (*United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 597.) Similarly, as to the fraudulent concealment rule, a "defendant's fraud in concealing a cause of action against him will toll the statute of limitations, and that tolling will last as long as a plaintiff's reliance on the misrepresentations is reasonable." (*Grisham, supra,* 40 Cal.4th at p. 637.) "'[W]hether reliance was reasonable is a question of *fact* for the jury.'" (*Ibid.*)

These factual questions become issues of law only if "'reasonable minds can draw only one conclusion from the evidence.'" (*E-Fab, supra,* 153 Cal.App.4th at p. 1320; *Grisham, supra,* 40 Cal.4th at p. 637.) As to the delayed discovery rule, "when an appeal is taken from a judgment of dismissal following the sustention of a demurrer, 'the issue is whether the trial court could determine as a matter of law that failure to discover was due to failure to investigate or to act without diligence.'" (*E-Fab*, at p. 1320.) As to the fraudulent concealment rule, the question is whether the trial court could decide as a matter of law that the plaintiff's reliance on the defendant's misrepresentations was unreasonable.

Defendant relies on *CAMSI, supra,* 230 Cal.App.3d at page 1537 and *Saliter v. Pierce Brothers. Mortuaries* (1978) 81 Cal.App.3d 292, 300, for the proposition that "discovery rule issues can be resolved on demurrer." But, in fact, those cases recognize the same test summarized above. *CAMSI* states: "A plaintiff whose complaint shows on its face that his or her claim would be barred by the applicable orthodox statute of limitations, and who intends to rely on the discovery rule to toll the orthodox limitation period, 'must specifically plead facts which show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.

[Citations.] Mere conclusory assertions that delay in discovery was reasonable are insufficient and will not enable the complaint to withstand general demurrer. [Citation.]' [Citations.] Arguments that discovery-rule issues are *necessarily* factual and cannot be resolved on demurrer have been rejected." (*CAMSI*, at pp. 1536-1537, italics added.) *Saliter* states: "Plaintiff appears to contend that whether delayed discovery was unreasonable in view of the facts alleged cannot be decided as a matter of law. This would be true if the facts alleged were susceptible to opposing inferences. [Citations.] Where, however, as in this case, the allegations bearing upon the issue of whether plaintiff had constructive notice of allegedly undiscovered facts would support only one legitimate inference, the question becomes one of law." (*Saliter*, at p. 300.)

Here, plaintiff pleaded specific facts, not merely conclusory assertions, in the operative complaint. Those facts support more than one legitimate inference regarding plaintiff's diligence and/or reasonable reliance. The complaint alleged defendant filed false documents with NHTSA and thus received NHTSA approvals; defendant fraudulently concealed its defective and unsafe modifications by filing such false documents, and through other falsehoods during discovery in this case; plaintiff diligently investigated its cause of action but was impeded by the burning of the subject Ferrari and its relevant vehicle parts, and plaintiff's lack of access to inspectors from Ferrari (then an adverse party); and as a result plaintiff relied on two non-Ferrari experts. Based on these alleged facts, a reasonable trier of fact could find that plaintiff diligently and reasonably investigated whether it had a cause of action against defendant and/or that plaintiff reasonably relied on defendant's fraudulent concealment of that cause of action.

Although it is true, as the court's order stated, that plaintiff quickly learned "the fire was caused by damage to the fuel filler neck and evaporative emissions hose" and defendant "performed the modification work," it is equally true these findings were consistent with a theory the manufacturer defectively designed the vehicle's fuel system. Plaintiff should not be penalized for making an effort to investigate, in lieu of filing a

premature and "'potentially meritless claim[]'" against defendant. (*Grisham, supra,* 40 Cal.4th at p. 645.) "It would be contrary to public policy to require plaintiffs to file a lawsuit 'at a time when the evidence available to them failed to indicate a cause of action.' [Citations.] Were plaintiffs required to file all causes of action when one cause of action accrued, . . . they would run the risk of sanctions for filing a cause of action without any factual support. [Citations.] Indeed, it would be difficult to describe a cause of action filed by a plaintiff, before that plaintiff reasonably suspects that the cause of action is a meritorious one, as anything but frivolous. At best, the plaintiff's cause of action would be subject to demurrer for failure to specify supporting facts." (*Fox, supra,* 35 Cal.4th at p. 815.) Moreover, defendant here suffered no prejudice from the late filing of plaintiff's complaint against it, since defendant was aware of plaintiff's investigation from a very early stage.

The court erred by sustaining defendant's demurrer to the operative complaint, after impliedly finding as a matter of law that the delayed discovery and fraudulent concealment rules did not toll the statute of limitations in this case.

DISPOSITION

The judgment is reversed. Plaintiff shall recover its costs on appeal.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.